No. 4088

United States Circuit Court of Appeals

For The Ninth Circuit

J. W. MAXWELL,
Plaintiff in Error,
vs.
EVA L. RICKS,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

REPLY BRIEF OF PLAINTIFF IN ERROR

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ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR.

It is indispensable to a review of the admission or rejection of evidence, or objections to a charge given or refused, or objections made to the proceedings had in the course of a trial at law, that exceptions to the rulings of the trial court be taken at the time and preserved for review by a bill of exceptions.

It is equally well settled that no exception, or bill of exceptions, is necessary to review a question of law already apparent on the record.

The memorandum decision shows that the only

question considered by the court was the construction of the California statute. The construction given that statute was to the effect that foreclosure must first be had before any action could be maintained on the secured obligation. The court declined to consider any other question involved, and ordered judgment for defendant. Record, 25.

The proceedings taken and the action had by the court are all recited in the judgment entry itself. Unnecessarily, exceptions were allowed by the trial judge to the ruling made and stated in the judgment entry. Record, 26.

The trial court declined to consider any matter or question concerning which evidence may have been taken. The existence of the California statute was not questioned, and it was expressly admitted that a mortgage was given to secure the notes, and that no suit had ever been brought in California, or elsewhere, to foreclose the mortgage.

The only error sought to be reviewed appears therefore on the record without need for bill of exceptions, or other exception. The bringing here of any evidence in a bill of exceptions, or exceptions based upon any ruling touching the evidence, is not only unnecessary but quite improper as well. The judgment denying the right of plaintiff in error to maintain the instant action is not challenged nor is it challengeable by any fact, proceeding, or ruling, save as recited in the judgment entry.

> "The record contains no bill of exceptions, and does not show any exception to the action

of the court in granting plaintiff's motion to withdraw a juror, or in allowing the case to be dismissed as it was. It is objected that, for lack of such exception, the error assigned cannot be considered. We think the case did not require any bill of exceptions. The entire action of the court is recited upon the face of the judgment entry, so that it fully appears upon the record, and no exception is required to raise the question whether the record in the case supports the challenged judgment."

Worthington v. McGough, 192 Fed. 512 (C. C. A. 6);

Chicago, R. I. & P. Ry. Co. v. Barrett, 190 Fed. 118, 123 (C. C. A. 6);

Willis v. Davis, 184 Fed. 889 (C. C. A.).

No exception, or bill of exceptions, is necessary to open a question of law already apparent on the record.

Denver v. Home Savings Bank, 236 U. S. 101, 104;

Nalle v. Oyster, et al., 230 U. S. 165, 176.

Also see the following:

Welsh v. United States, 267 Fed. 819 (C. C. A. 2);

Rocky Mountain Fuel Co. v. Consolidated Coal &c. Co., 276 Fed. 661, 666 (C. C. A. 8).

In refusing to consider any other point in the case, and in dismissing the action upon the construction given to the California statute, the court

below necessarily proceeded upon the ground that, independently of every question, the plaintiff in error could only recover after exhausting his remedy by foreclosure of the mortgaged lands. If this ruling or judgment is error, it is one apparent on the record and need not have been presented by bill of exceptions.

Moline Plow Co. v. Webb & Bros., 141 U. S. 616, 623.

The contention made by counsel for defendant in error is based upon a misapprehension. They are largely led into an erroneous conception of the practice by the misconstruction which they placed upon the effect of the ruling in *Humphreys v. Third National Bank of Cincinnati*, 75 Fed. 852. The court was there dealing with special findings of fact to be made upon the evidence, and special conclusions of law to be drawn therefrom. The true situation is disclosed by the following quotation from the opinion:

> "When a party in the circuit court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the

facts found, he should have them separately stated and excepted to. In this way, and in this way only, it is possible for him to review completely the action of the court below upon the merits."

The position which counsel is contending for is very clearly and tersely summarized by Justice Miller in *Norris v. Jackson*, 76 U. S. 125. It is, in legal effect, a resume of the views stated by Judge Taft in the *Humphreys* case *supra*. Justice Miller's condensation of the matter, when construed in connection with the rule given in the cases from the same jurisdiction, cited above, furnish the true rule relating to when an exception, or bill of exceptions, may be necessary.

The action was dismissed for the reason and upon the record fact in the judgment itself. We believe the ruling to be erroneous, and that claimed error is now apparent upon the record, and the sole question which this court is called upon to examine, is the correctness of the ruling recited in and carried into the judgment.

The United States Courts will take judicial notice of the public laws and jurisprudence of all the states. 15 R. C. L. p. 1076. This in answer to an observation found at page 13, first paragraph, of opposing brief.

Respectfully submitted,

CARROLL B. GRAVES,

Attorney for Plaintiff in Error.